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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1163

HAROLD FRANKLIN SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Michelson v. *United States*, 335 U.S. 469, 93 L.Ed. 168 7

IN THE

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No. .....

HAROLD FRANKLIN SMITH,
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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in F.2d . A copy of the official opinion of this case is appended hereto. (R. 79/80).

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, entitled Harold Smith v. United States of America, No. 22156, is dated January 24, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and under and by virtue of Title 18 U.S.C. 3772, within the time provided for in Rule XI and Rule 22 (2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of federal law of gravity and importance in the administration of criminal justice which have not been, but should be settled by this Court. Said Court has misconstrued and applied decisions of this Court respecting the instructions which must be given to the jury, and has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTIONS PRESENTED

1.

Did the District Court err in instructing the jury that it was permitted to consider impeachment evidence as an aid in determining appellant's credibility by comparing his testimony with that of other witnesses?

(d)

STATEMENT OF CASE

Appellant was indicted by a six count indictment charging violations of Internal Revenue laws relating to distilled spirits. He entered a plea of not guilty and was tried before a jury of the United States District Court for the Middle District of Georgia, Athens Division, on November 30, 1964. The verdict of the jury found the appellant guilty as charged. On December 3, 1964, appellant was sentenced by the Court to serve two years in the custody of the Attorney General of the United States.

The various counts of the indictment charged appellant with possession of an unregistered distillery (Count 1); carrying on the business of a distiller without having given bond (Count 2); carrying on the business of a distiller with intent to defraud the United States (Count 3); working at an unregistered distillery (Count 4); possession of nontaxpaid distilled spirits (Count 5); and concealing distilled spirits with intent to evade the taxes on the same (Count 6). A co-defendant, Tom C. Watson, pleaded guilty to the indictment and is not involved in this case.

Officer Maine a Federal Revenue Agent, testified that in the early morning hours of August 21, 1964, he located a distillery in Oconee County, Georgia. (R. 6). On the same date, after securing a search warrant, he and other officers returned to the site and found the distillery in operation. (R. 8). The distillery was under a shelter and Main saw one man moving around under the shelter. (R. 9). That man, later identified as appellant (R. 11) was near the catchbarrel and he was "moving about and handling the different articles there." (R. 10). After being advised of his constitutional rights with respect to making a

statement, appellant virtually confessed to operating the distillery (R. 11/13), and stated that he was living in the nearby barn which was connected with the operation of the distillery. (R. 14). He further told the officers, "I don't have nothing to do with that jarring up, up there. I just run the still." (R. 21).

The other government witness, Agent J. Byron Davis, testified that after appellant was arrested at the distillery, he accompanied appellant to the barn. Appellant asked him if he could change his clothes, which request was granted. Whereupon, appellant climbed into the loft of the barn, removed clean clothes from a box which was under one of the two cots in the loft, and changed clothes. He placed the clothes he had been wearing in the box and took it to jail with him. (R. 33/34).

The appellant's wife testified that because of a family dispute, their 17-year-old son had left home on August 7, 1964. (R. 38). She had received information that the boy might be in Oconee County working at a distillery or "car stripping or something". Upon receiving this information, she implored appellant to attempt to find the boy and get him to return home. (R. 39). Appellant testified that upon receiving the above information he went to Oconee County and hunted for the distillery where his son was reportedly working. He located the distillery but it was not in operation. Three or four days later he returned, bringing some clothes with him. (R. 40). He had returned to the distillery on the Wednesday night before he was apprehended on Friday (R. 42) and had stayed in the barn. (R. 41). While he was there he observed activity at the distillery. It was his purpose to wait until the operators were busy at the distillery and he could move in and catch his son. (R. 41). When he thought the time proper, he went into

the distillery yard and was apprehended shortly thereafter. (R. 41). Appellant denied that he had admitted to the officers that he had in any way participated in the distillery operation, although he did engage in a general discussion concerning operation of the distillery. (R. 42/46).

For impeachment purposes, on cross-examination, the United States Attorney established that appellant had previously been convicted of felonies involving nontaxpaid whiskey. (R. 45/50).

In its instructions to the jury, the court, with reference to the impeachment evidence, instructed the jury as follows:

> "There is certain testimony in this case for a limited purpose, namely, testimony referred to generally as impeaching testimony. It appears from the evidence that this (59) defendant has either pleaded guilty or been convicted heretofore to some felonies involving violations of the whiskey laws. That evidence would not be here except for the fact that the defendant is a witness in this case. And that evidence is properly here for such value as you desire to ascribe to it and such as you think you should, in determining and passing upon the credibility of the witness in this case.
>
> "When you come to the function of comparing the defendant's testimony with the testimony of other witnesses, weighing testimony, comparing testimony, then the fact of prior convictions of felonies is a pertinent and material fact so as to be admissible in evidence. You would not convict this defendant in this case just because he was guilty on other occasions, but you may consider that record in passing upon the credibility of the witnesses, because the law says that a person may be impeached by the proof of a prior conviction of felonies."

To the foregoing instructions, appellant excepted as follows:

> "If the Court, the defendant excepts to that portion of the charge which begins similar to: 'When you come to the point of weighing the testimony'—with reference to impeachment testimony, the Court instructed, as we recall the charge, that 'When you come to the point of weighing his testimony and comparing it with others, you will consider this evidence as to whether or not his testimony has been impeached.' We submit, first of all, that the charge was confusing as given, particularly with reference to the element of comparing his testimony with other testimony in determining whether or not he has been impeached.
>
> "Secondly, we submit that the effect of the charge was saying, 'all things being equal, then in comparing his testimony with the other testimony, then you would accept the other testimony.' We submit that the effect of the charge was that.
>
> "Finally, we submit that impeachment testimony is—that the charge was wrong as an abstract principle of law, in that the purpose of impeachment testimony is to aid a jury in comparing the testimony of one witness with that of another."

On Appeal, the Court of Appeals affirmed the conviction. The Court did not decide whether or not the charge was erroneous, but held that if there was error, "it was at most a slight technical imperfection".

REASONS FOR GRANTING THE WRIT

The decision of the Court below has decided an important question of federal law which has not been settled by this Court. Decision below should be reviewed because it permits a charge to the jury which in effect evaded the province of the jury as to how it should go about its de-

liberations. It is, of course, proper in a criminal case for the trial court, where the evidence warrants instruction on impeachment evidence, to charge the jury with respect to the effect of such evidence. Where, as here, the evidence relates to prior felony convictions, it is usual and entirely permissible for the court to charge that evidence of a defendant's previous convictions of felonies is to be considered by the jury only insofar as it affects the credibility of the defendant as a witness. *Michelson* v. *United States,* 335 U.S. 469, 93 L.Ed 168. In the present case, however, the court went much further than this. It instructed the jury to not only consider the evidence as it might relate to appellant's credibility as a witness, but also in comparing his testimony with that of the other witnesses.

The court correctly charged the jury that it could not convict appellant because the evidence showed that he had been guilty on other occasions. However, this did not remove the prejudice to appellant arising from its instruction that it should consider the impeachment evidence in its function of comparing his testimony with that of other witnesses. The effect of the charge, we submit, was to instruct the jury that in view of the impeachment evidence, "all things being equal, then in comparing his (appellant's) testimony with the other testimony, then you would accept the other testimony."

The purpose of impeachment evidence is to aid the jury in determining the credibility of the witness, and not to aid the jury in the comparison of the testimony of one witness with that of another. The function of the jury in this regard is to determine whether the witness has been successfully impeached; whether he is worthy of belief. We do not contend that in the execution of this function it is not proper for the jury to consider the witnesses' testimony

in the light of all of the facts of the case. We do contend, however, that it is improper for the court to instruct the jury that the purpose of such evidence is to aid it in comparing the witnesses' testimony with the testimony of others.

The Court below sought to avoid the question raised by appellant's appeal and to hold simply that the language complained of a slight technical imperfection. Since the jury did return a verdict of guilty, it cannot be considered a harmless technicality and cannot be avoided simply because the government had a convincing case. If such a procedure was continued, then defendant's testimony in any criminal case would amount to a futile act and destroy a fundamental right of defendant to testify in his own behalf and to have that testimony be given the same weight as any other testimony under the general rules of evidence.

The question presented by this case is of great and recurring significance in the administration of criminal justice. The serious question of public policy involved here and the effect of the decision below, if unreversed, upon the administration of criminal law makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN N. CRUDUP

ROBERT B. THOMPSON

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing petition of Harold Franklin Smith were this date deposited in the United States Post Office, Gainesville, Georgia, with air mail postage prepaid, addressed as follows: Solicitor General, Department of Justice, Washington 25, D. C.; Rufus D. McLean, Esq., Special Attorney, Department of Justice, Washington 25, D. C.; and E. Coleman Madsen, Esq., United States Attorney, Miami, Florida.

This ..... day of March, 1966.

.....

JOHN N. CRUDUP

.....

ROBERT B. THOMPSON

Of Counsel

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22156
D. C. Docket No. 2222-Criminal

HAROLD FRANKLIN SMITH,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN and COLEMAN, Circuit Judges, and GARZA, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 24, 1966

Issued as Mandate: February 15, 1966

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22156

HAROLD FRANKLIN SMITH,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(Filed in the U. S. Court of Appeals March 1, 1966, Edward W. Wadsworth, Clerk)

Before BROWN and COLEMAN, Circuit Judges, and GARZA, District Judge.

ON CONSIDERATION OF THE MOTION of Appellant for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States,

IT IS ORDERED that the judgment issued as mandate to the clerk of the United States District Court at Macon, Georgia, on February 15, 1966, be recalled and stayed to and including March 31, 1966, the stay to continue in force until the final disposition of the case by

the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 221566

HAROLD FRANKLIN SMITH,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(January 24, 1966.)

Before BROWN and COLEMAN, Circuit Judges, and GARZA, District Judge.

PER CURIAM: On a trial for illicit liquor operations, the Defendant-Appellant took the stand as a witness. The Government, quite naturally and properly, offered evidence of his prior and somewhat extensive record of convictions. The Court received this for the limited purpose of impeachment. The only error asserted here is that the charge as to credibility of the accused and other witnesses was incorrect. If there was error, and we do not intimate that there necessarily was, it was at most a slight technical imperfection. When considered in the light of the charge as a whole, the jury could not possibly have been confused or misdirected by these instructions and no prejudicial harm resulted.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1163

HAROLD FRANKLIN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals (Pet. App. C) was entered on January 24, 1966. The petition for a writ of certiorari was filed on March 29, 1966.[1] and is therefore out of time under Rule 22–2 of the Rules of this Court. In any event the issue raised by the petitioner does not warrant review by this Court.

After trial by jury in the United States District Court for the Middle District of Georgia, petitioner

[1] Petitioner in his index treats as the denial of a petition for rehearing the granting of a motion to recall the mandate (Pet. A–2). Not only is this not a denial of a petition for a rehearing; the motion was granted after the time for filing a petition for a writ of certiorari had expired.

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was convicted on six counts of violating tax laws relating to distilled spirits. Petitioner was sentenced to two years' imprisonment on each of five counts and twelve months' imprisonment on the remaining count, all to be served concurrently. The court of appeals affirmed *per curiam*.

The relevant evidence showed that an agent of the Alcohol and Tobacco Tax Unit located a still in a wooded area on August 21, 1964 (R. 6).[2] After securing a federal search warrant the agent returned to the still and observed petitioner near the catch-barrel moving around and handling various objects (R. 8–11). The agent then approached the still and, after advising petitioner of his rights, spoke to him about its operation (R. 11, 13). Petitioner admitted running the still and living in the barn nearby, but he denied that he worked on the bottling (R. 14, 21, 22). Approximately thirty-five gallons of untaxed liquor were confiscated and destroyed.

Petitioner took the stand and on cross-examination the government (for purposes of impeachment) asked about three prior convictions involving distilled spirits (R. 49–50). The court instructed the jury as follows:

> There is certain testimony in this case for a limited purpose, namely, testimony referred to generally as impeaching testimony. It appears from the evidence that this defendant has either pleaded guilty or been convicted heretofore to some felonies involving violations

[2] "R." designates the record on appeal and transcript of trial which is on file with the Clerk of this Court.

> of the whiskey laws. That evidence would not be here except for the fact that the defendant is a witness in this case. And that evidence is properly here for such value as you desire to ascribe to it and such as you think you should, in determining and passing upon the credibility of the witness in this case.
>
> When you come to the function of comparing the defendant's testimony with the testimony of other witnesses, weighing testimony, comparing testimony, then the fact of prior convictions of felonies is a pertinent and material fact so as to be admissible in evidence. You would not convict this defendant in this case just because he was guilty on other occasions, but you may consider that record in passing upon the credibility of the witness, because the law says that a person may be impeached by the proof of a prior conviction of felonies [R. 63, 64].

Petitioner admits that the instruction is correct insofar as it deals with credibility, but argues that it was error to say that prior convictions could be considered in comparing testimony of one witness with another (Pet. 6–8). Reading the instruction as a whole, it is evident that the language used was simply another way of saying that the convictions could be considered in determining credibility. The court specifically pointed out that the prior convictions could not be the basis for conviction in this case.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
DONALD I. BIERMAN,
Attorneys.

APRIL 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966